

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Cause No. 1:10-cr-0034-01 (B/F)
)	
DARRYL KILGORE,)	
)	
Defendant.)	

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

This matter is before the undersigned U. S. Magistrate Judge pursuant to the Order entered by the Honorable Sarah Evans Barker, Judge, on August 30, 2011, designating this Magistrate Judge to conduct hearings on the Petition for Summons or Warrant for Offender Under Supervision, filed with the Court on August 23, 2011, and to submit to Judge Barker proposed Findings of Facts and Recommendation for disposition under Title 18 U.S.C. §§3401(i) and 3583(e). All proceedings in this matter were held on September 16, 2011, pursuant to Title 18 U.S.C. §3583, and Rule 32.1(a)(1) of the *Federal Rules of Criminal Procedure*.¹ The government appeared by William McCoskey, Assistant United States Attorney; the defendant appeared in person with his appointed counsel, William Marsh, the Indiana Federal Community Defender; and Billie Galbreath, U. S. Parole and Probation officer, appeared and participated in the proceedings.

¹ All proceedings are recorded by suitable sound recording equipment unless otherwise noted. *See*, Title 18, United States Code, Section 3401(e).

On September 16, 2011, the Court conducted the following procedures in accordance with Rule 32.1(a)(1) *Federal Rules of Criminal Procedure* and Title 18 U.S.C. §3583:

1. That William Marsh, the Indiana Federal Community Defender, appointed counsel, was present to represent Mr. Kilgore in regard to the Petition for Revocation of Supervised Release.

2. A copy of the Petition for Revocation of Supervised Release was provided to Mr. Kilgore and his counsel who informed the Court that they had read and understood the specifications of each alleged violation and waived further reading thereof.

3. Mr. Kilgore was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petition.

4. That Mr. Kilgore would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

5. That Mr. Kilgore had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

6. That if the preliminary hearing resulted in a finding of probable cause that Mr. Kilgore had violated the alleged condition or conditions of supervised release set forth in the Petition, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Barker's designation on August 30, 2011.

7. Mr. Kilgore stated his readiness to waive the preliminary hearing. Mr. Kilgore then waived, in writing, the preliminary hearing and he was held to answer.

8. Mr. Kilgore, by counsel, stipulated that he committed violations of specifications 1, 2 and 3, but not violations of specifications 4 and 5. The government agreed that it would dismiss

violations of specifications 4 and 5, and the Court granted same. The violations admitted to are as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
1.	“The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.”
2	“The defendant shall refrain from any unlawful use of a controlled substance.”
3	“The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.”

As previously report to the Court, on May 23, June 9, June 21, June 27, and July 6, 2011, Darryl Kilgore submitted specimens which tested positive for marijuana. Additionally, the offender submitted specimens that tested positive for marijuana on July 26, and August 18, 2011. Mr. Kilgore admitted he had been using marijuana for six months purportedly to deal with the stress in his life.

The Court placed Mr. Kilgore under oath and directly inquired of him whether he admitted specifications of violations of his supervised release set forth above. Mr. Kilgore stated that he admitted the above violations as set forth. The Court now finds there is a basis in fact for his admissions and accepts same.

Counsel for the parties further stipulated to the following:

- 1) Mr. Kilgore has a relevant criminal history category of III, U.S.S.G. §7B1.4(a).
- 2) The most serious grade of violation committed by Mr. Kilgore constitutes a Grade C violation, pursuant to U.S.S.G. §7B1.1(b).
- 3) Pursuant to U.S.S.G. §7B1.4(a) upon revocation of supervised release, the range of imprisonment applicable to Mr. Kilgore is 5-11 months.

4) The parties agree that the appropriate disposition for Mr. Kilgore's violation of the conditions of supervised release is to modify his supervised release as follows:

- i. Mr. Kilgore's supervised release conditions be modified to include him residing at a community corrections center, namely, the Volunteers of America, Indianapolis, Indiana until December 16, 2011.
- ii. Upon completion of his residency at the VOA, Mr. Kilgore will continue on supervised release for a period of 12 months from December 16, 2011, under the same conditions imposed at sentencing.

The Magistrate Judge informed the defendant and the parties' respective counsel that he would accept the parties' stipulations.

The Court placed Mr. Kilgore under oath and directly inquired of him whether he admitted the specifications of violations of his supervised release set forth above. Mr. Kilgore stated that he admitted the above violations as set forth. The government moved to dismiss specifications of violations 4 and 5, and the Court granted same. The Court, having heard the admissions of the defendants, the stipulations of the parties, **NOW FINDS** that the defendant violated the above-delineated conditions of his supervised release. The defendant's supervised release is therefore **MODIFIED** as stated above. The Magistrate Judge requests that Billie Galbreath, U. S. Parole and Probation officer, prepare for submission to the Honorable Sarah Evans Barker, Judge, as soon as practicable, a modified judgment and commitment order, in accordance with these findings, conclusions of law and recommendation.

Counsel for the parties and Mr. Kilgore stipulated in open court waiver of the following:

1. Notice of the filing of the Magistrate Judge's Report and Recommendation;
2. Objection to the Report and Recommendation of the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §636(b)(1)(B); Rule 72(b), *Federal Rules of Civil*

Procedure, and S.D.Ind.L.R.72.1(d)(2), Local Rules of the U.S. District Court for the Southern District of Indiana.

Counsel for the parties and Mr. Kilgore entered the above stipulations and waivers after being notified by the undersigned Magistrate Judge that the District Court may refuse to accept the stipulations and waivers and conduct a revocation hearing pursuant to Title 18 U.S.C. §3561 *et seq.* and Rule 32.1 of the *Federal Rules of Criminal Procedure* and may reconsider the Magistrate Judge's Report and Recommendation, including making a *de novo* determination of any portion of the Report or specified proposed findings or recommendation upon which he may reconsider.

WHEREFORE, the U. S. Magistrate Judge **RECOMMENDS** the Court adopt the above recommendation modifying Mr. Kilgore's supervised release as set forth above.

IT IS SO RECOMMENDED this 27th day of September, 2011.



Kennard P. Foster, Magistrate Judge
United States District Court

Distribution:

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